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# Supreme Court of the United States

OCTOBER TERM, 1927

No. 133

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Petitioner*,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON,
*Respondent.*

*ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.*

## BRIEF FOR PETITIONER.

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Of Counsel.

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# Supreme Court of the United States

OCTOBER TERM, 1927.

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No. 983

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THE CHESAPEAKE AND OHIO RAILWAY COMPANY, *Petitioner*,

v.

TOBE STAPLETON, BY HIS STATUTORY GUARDIAN, MARION STAPLETON, *Respondent.*

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*ON WRIT OF CERTIORARI.*

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## BRIEF FOR PETITIONER.

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*May it Please the Court:*

This additional brief is filed on behalf of the petitioner for the purpose of extending what is contained in the original brief filed in support of the petition for a writ of certiorari.

A judgment was recovered herein by the respondent in the Circuit Court of Floyd County, Kentucky, for the sum of $17,500.00. Thereafter, that judgment was affirmed by the Court of Appeals of Kentucky *(223 Ky. 154, 3 S. W. (2d) 209)*. The action was brought under and pursuant to the provisions of

the Federal Employers Liability Act (45 U. S. C. A., Secs. 51-59). The sole ground upon which a recovery was had in the trial court, and an affirmance thereof obtained in the appellate court, was the employment of the respondent by the petitioner in violation of the provisions of Sec. 331a Kentucky Statutes (appended to the petition for writ of certiorari), which prohibits the employment in certain occupations and trades, of infants under the age of sixteen.

## QUESTIONS OF LAW INVOLVED

The precise question of law presented for determination herein, is,

*In a suit under the Federal Employers' Liability Act, may a recovery be had upon allegation and proof of a violation by the defendant of a state statute?*

Or, to phrase the same question in broader language,

*In actions under the Federal Statute, is an asserted right of recovery dependent upon state statutes and state rules of decision or upon the rules of the common law as construed and applied by the Federal Courts?*

The Kentucky appellate court in affirming the judgment of the trial court, laid down the following rule as governing the determination of the question of liability under the Federal act *(223 Ky. 154, 3 S. W. 209; pp. 47-53, Record)*:

> "The violation of section 331a-9 is negligence. The Federal Employers' Liability Act makes a railroad company liable for neg-

ligence. That section of the Ky. Stats. is not superseded by the Federal Act. *Whether the railroad company is guilty of negligence depends upon the law of the state where the injury happened unless the law of the state is in conflict with the Federal Act.*"

In so holding the Kentucky court followed its previous holding in *Cincinnati, N. O. & T. P. Ry. Co. v. Swann's Admx., 160 Ky. 458, 169 S. W. 886;* and *Helm v. Cincinnati, N. O. & T. P. Ry. Co., 156 Ky. 240, 160 S. W. 945;* a ruling which, it may be noted, is not in harmony with utterances of the same court in *Louisville & N. R. Co. v. Grant, 223 Ky. 39, 2 S. W. (2d) 1063*, and the earlier decisions referred to in the opinion rendered herein.

It is respectfully submitted that the conclusion reached herein by the Kentucky Court of Appeals is unsound and in direct conflict with what has been repeatedly decided by this court.

## ARGUMENT

### I

### THE BASIS OF RECOVERY UNDER THE FEDERAL ACT

Liability under the act is dependent upon the existence of negligence. The mere fact that injury or death results to an employee will not of itself authorize a recovery. Unless the injury or death was caused by the negligence of the carrier master there can be no recovery therefor. In *Seaboard A. L. R.*

*Co. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062*, this court, in discussing the primary question of liability under the act, said:

> "By its 1st section a right of action is conferred (under conditions specified) for injury or death of the employee 'resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.'
>
> "This clause has two branches; the one covering the negligence of any of the officers, agents or employees of the carrier, which has the effect of abolishing in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. Hough v. Texas & P. R. Co., 100 U. S. 213,

217, 25 L. ed. 612, 615; Washington & G. R. Co. v. McDade, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 67, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230. To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common-law rule, certainly the act now limits the responsibility of the company as indicated."

See also, *Southern Ry. Co. v. Gray, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030; New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045; New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 Sup. Ct. 535, 62 L. Ed. 1167.*

## II

## MODE OF DETERMINING WHAT CONSTITUTES NEGLIGENCE

There is no definition in the act of "negligence" as a basis of liability. Consequently, the question at once arises as to whether its existence in any particular case is to be determined by the federal law or by state statutes and rules of decision.

It is submitted that the rule is established by repeated decisions of this court that in actions under the Federal statute the right of recovery is dependent

upon the principles of the common law, *as interpreted and applied in the federal courts*, and as modified *by federal statutes* prescribing safety appliances and other precautionary measures; that the right of action created by the statute can neither be broadened or limited by any state statute or rule of decision.

In *Chicago, M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 46 Sup. Ct. 564, 70 L. Ed. 1041*, we find this statement of the principles which govern the determination of what constitutes a right of action under the statute:

> "By the Federal Employers' Liability Act, Congress took possession of the field of employers' liability to employees in interstate transportation by rail, *and all state laws upon that subject were superseded.* Second Employers' Liability Cases, 223 U. S. 1, 55, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; Seaboard Air Line v. Horton, 233 U. S. 492, 501, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1 Ann. Cas. 1915B, 475. *The rights and obligations of the petitioner depend upon that act and applicable principles of common law as interpreted by the federal courts.* The employer is liable for injury or death resulting in whole or in part from the negligence specified in the act and proof of such negligence is essential to recovery. The kind or amount of evidence required to establish it is not subject to the control of the several states. This court will examine the record, and if it is found that, as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed." (Italics ours.)

In support of the above, we would call attention to similar expressions in the following decisions:

> "And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is." *(Second Employers' Liability Cases, 223 U. S. 1, 32 S. Ct. 169, 56 L. Ed. 327.)*

> "But it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employees in interstate transportation by rail, all state laws upon the subject are superseded." *(Seaboard A. L. R. Co. v. Horton, supra.)*

> "As the action is under the Federal Employers' Liability Act, rights and obligations depend upon it, and applicable principles of common law as interpreted and applied in Federal courts." *(Southern Ry. Co. v. Gray, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030.)*

> "In proceedings brought under the Federal Employers' Liability Act rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts; and negligence is essential to recovery." *(New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167.)*

See also, *Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 48 S. Ct. 215, 72 L. Ed. 513.*

The statement that the nature and extent of the rights and obligations created by the act are dependent upon the applicable principles of the common law as interpreted and applied in the Federal courts, should be extended to include *federal* statutes prescribing safety appliances and other precautionary measures. As was pointed out in *San Antonio & A. P. R. Co. v. Wagner, 241 U. S. 476, 36 S. Ct. 626, 60 L. Ed. 1110,* in upholding a right of recovery under the Employers' Liability Act for a violation of the Safety Appliance Act:

> "The Employers' Liability Act, as its 4th section very clearly shows, recognizes that rights of action may arise out of the violation of the safety appliance act. • • • The two statutes are *in pari materia*, and where the employers' liability act refers to 'any defect or insufficiency, *due to its negligence*, in its cars, engines, appliances,' etc., it clearly is the legislative intent to treat a violation of the safety appliance act as 'negligence'—what is sometimes called negligence *per se*."

See also *Cent. Vt. Ry. Co. v. Perry (C. C. A.) 10 Fed. (2d) 132; Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.*

The necessary effect of what is said in the decisions above cited is to exclude from consideration, as a basis of any right of action under the federal act, state statutes and state rules of decision. This leads to a consideration of

## III

## SPECIFIC INSTANCES OF THE EXCLUSION OF STATE RULES OF DECISION AND STATE STATUTES AS A BASIS OF RECOVERY IN ACTIONS UNDER THE FEDERAL STATUTE

The leading case of *Seaboard A. L. R. Co. v. Horton, supra*, presents three separate instances of the exclusive nature of the Federal Act, so far as the applicability of a state statute or state rule of decision is concerned. In the first place, it was there held that a statute of North Carolina which imposed upon the employer an absolute liability for defects in machinery and appliances was without application in an action under the Federal Statute; an instruction based upon the North Carolina statute was condemned by this court upon the ground that "all state laws upon the subject are superseded."

A second question as to the application of a state law was also presented and decided in this case. A recovery was there sought because of an alleged defect in a water gauge and guard glass upon the engine on which the plaintiff was employed as an engineer. The North Carolina statute, as construed by the state supreme court, abolished the defense of assumed risk in an action for an injury attributable to defective appliances. Notwithstanding the fact that the particular appliance involved was not within the provisions of any federal safety appliance act, this court held that the North Carolina statute was without application, and therefore the refusal of the trial court to instruct on the defense of assumed risk was erroneous, it being said:

"It is true that such an appliance as the water gauge and guard glass in question is not covered by the provisions of the safety appliance act, or any other law passed by Congress for the safety of employees, in force at the time this action arose. But the necessary result of this is not to leave the employer responsible for the consequences of any defect in such an appliance, excluding the common law rule as to assumption of risk, but to leave the matter in this respect open to the ordinary application of the common law rule. The adoption of the opposite view would in effect leave the several state laws, and not the act of Congress, to control the subject matter."

Finally, in construing the provisions of Sec. 4 of the act, abolishing the defense of assumed risks in cases involving a violation "of any statute enacted for the safety of employees," the court held that the phrase quoted included only Federal statutes, and not state legislation It was said:

"For it is not to be conceived that, in enacting a general law for establishing and enforcing the responsibility of common carriers by railroad to their employees in interstate commerce, Congress intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer."

In *New Orleans & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167*, a statute of

Mississippi providing that proof of injury was *prima facie* evidence of negligence was held inapplicable to an action under the Federal act. This ruling was subsequently following in *Yazoo & M. V. R. Co. v. Mullins, 249 U. S. 531, 39 S. Ct. 368, 63 L. Ed. 754,* and *New Orleans & N. E. R. Co. v. Scarlet, 249 U. S. 528, 39 S. Ct. 369, 63 L. Ed. 752.* A similar conclusion as to a state rule of decision relative to the burden of proof on the defense of contributory neglect was reached in *Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.*

In *Toledo, St. Louis & W. R. Co. v. Slavin, 236 U. S. 454, 35 S. Ct. 306, 59 L. Ed. 671,* an Ohio statute abolishing the defenses of contributory neglect and assumed risk when an injury resulted from a defect in "rail, track, or machinery," was held without application to an action for injuries against an interstate carrier by an employee injured while engaged in interstate commerce.

*New York Cent. & H. R. Co. v. Tonsellito, 244 U. S. 360, 37 S. Ct. 620, 51 L. Ed. 1194,* involved the right of a father to maintain a common law action for loss of services of his son resulting from the latter's injury while employed by the railway company in interstate commerce. In denying any right of recovery, the court said:

> "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state."

In *Taylor v. Taylor, 232 U. S. 363, 34 S. Ct. 350, 58 L. Ed. 638*, it was held that the provisions of the federal act govern the distribution of damages recovered thereunder to the exclusion of state statutes of descent and distribution.

The case of *Spokane & Inland E. R. Co. v. Campbell, 241 U. S. 497, 36 S. Ct. 683, 60 L. Ed. 1125*, was an action under the federal statute. The defendant railway company sought to defeat liability upon the ground that the plaintiff's conduct was in violation of certain Idaho statutes rendering a wilful omission of duty, or wilful or negligent conduct, in the operation of trains, a criminal offense. In holding such defense to be without merit the court said:

> "Whether Campbell was or is punishable criminally under either of these sections we are not called upon to say. But his right to recover against his employer depends upon the acts of Congress, to which all state legislation affecting the subject-matter must yield."

Closely analogous and controlling in principle, are those decisions of this court wherein it was held that an employee injured in interstate commerce was not entitled to an award under a state compensation act, even though, because of the absence of negligence, there was no right of recovery under the Federal statute. We refer to the cases of *New York Cent. R. Co. v. Winfield, 244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045; Erie R. Co. v. Winfield, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057; New York Cent. R. Co. v. Porter, 249 U. S. 168, 39 S. Ct. 188, 63 L. Ed. 536; Southern Pacific Co. v. Industrial Accident Com., 251*

*U. S. 259, 40 Sup. Ct. 130, 64 L. Ed. 258; Philadelphia & R. Ry. Co. v. Hancock, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907.*

It is submitted that the application to the case at bar of the conclusions reached and the principles announced, in the above cited decisions of this court, establish beyond doubt that the holding of the Kentucky Court of Appeals is in direct conflict with the now firmly established principle that the federal act "is comprehensive and also inclusive" *(New York Central R. Co. v. Winfield, supra)*, and "established a rule or regulation which is intended to operate uniformly in all the states, as respects interstate commerce and in that field it is both paramount and exclusive" (Erie Railroad Co. v. Winfield, supra).

## IV

## THE REASONS UPON WHICH THE HOLDING OF THE KENTUCKY COURT IS BASED ARE UNSOUND

In the first place, the conclusion of the Kentucky Court is based upon the following syllogistic reasoning: That "the violation of section 331a-9 (Kentucky Statutes) is negligence"; that "the Federal Employers' Liability Act make a railroad company liable for negligence"; therefore, there may be a recovery under the Federal act for a violation of the state statute. Stated separately both premises are correct; stated together they have no relation one to the other, and the conclusion attempted to be drawn does not follow.

It may be conceded that the employment of the respondent in violation of the provisions of Sec. 331a-9

Ky. Stats. was "negligence"—what is sometimes called negligence per se. *San Antonio & A. P. R. Co., v. Wagner, supra; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874; Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521, 45 S. Ct. 169, 69 L. Ed. 419.*

It may also be conceded that the provisions of the Federal act render a railroad company liable for "negligence" resulting in injury.

But "negligence" as descriptive of a violation of the state statute is not synonymous with, or included in "negligence" as used in the Federal act.

As hereinbefore pointed out the right of recovery under the Federal statute—and this necessarily involves a determination of what is, and what is not, negligence—depends upon applicable principles of the common law as interpreted and applied in the federal courts *(Chicago, M. & St. P. Ry. Co. v. Coogan, supra)*, and as modified or extended by federal statutes prescribing safety appliances and other precautionary measures *(San Antonio & A. P. R. Co. v. Wagner, supra)*. It is upon the existence of negligence as so defined, that liability under the Federal act depends. The employment of the respondent was not negligence at common law, nor was it prohibited by any act of Congress; it therefore follows that it was not "negligence" within the meaning of the Federal Act, and could not be made so merely because denounced by a state statute. It is expressly so held in *Seaboard A. L. R. Co. v. Horton, supra*, and in *Spokane & Inland E. R. Co. v. Campbell, supra*, and it is a conclusion that necessarily follows from the exclusion of state legislation

from the purview of the provisions of Sections 3 and 4 of the Federal act, which abolish the defenses of contributory neglect and assumption of risk in cases of violation "of any statute enacted for the safety of employees." See *Seaboard A. L. R. Co. v. Horton, supra.* So far as determinative of what constitutes negligence under the Federal Act, there can be no difference between a state statute and a state rule of decision; and it has been repeatedly held by this court that in ascertaining whether or not negligence exists in any particular case, the decision of a state court of last resort is not binding upon this court, but that the question is one to be determined in accordance with the applicable principles of the common law as interpreted by the Federal courts. See *Toledo, St. L. & W. R. Co. v. Allen, supra; Missouri Pac. R. Co. v. Aeby, 275 U. S. 476, 48 S. Ct. 177, 72 L. Ed. 351; Gulf M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. Ed. 370; Chicago M. & St. P. R. Co. v. Coogan, supra; Davis v. Green, 260 U. S. 349, 43 S. Ct. 123, 67 L. Ed. 299; Ches. & Ohio Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914.*

It is obvious from the above that the Kentucky court erred in concluding that the Federal statute authorizes a recovery for a negligence which owes its existence, not to any principle of the common law or rule promulgated by a federal statute, but solely to state legislation as construed by the state court.

The real vice of the Kentucky decision lies in the following declaration as to the scope and effect of the Federal act:

> "That act (section 2) makes a railroad company liable in damages for 'injury or

death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier.' That is the only provision of the act relating to negligence, and that provision would not supersede any law of a state defining negligence. * *

"Whether the railroad company is guilty of negligence depends upon the law of the state where the injury happened unless the law of the state is in conflict with the federal act."

In passing, it may be remarked that the Court of Appeals erred in assuming that the state statute, as construed and applied to the case at bar, was not in conflict with the Federal act; in ascribing to the state statute the creation of a right in an employee engaged in interstate commerce to maintain an action for damages resulting from a violation of its provisions, the state enactment makes an act negligent which is not so declared to be by the Federal statute; as so construed, it is in conflict with the act of Congress.

But the outstanding error of the decision is in the limitation placed upon the scope and effect of the Federal Act. While recognizing the supremacy of the act to the extent of any conflict with the state legislation, there is a denial that the act took possession of the entire field of liability of carriers by railway for injuries sustained by their employes in interstate commerce and superseded state laws upon that subject. In short, the Kentucky court while recognizing the supremacy of the act, denies its exclusiveness. Such holding is in direct conflict with the hereinbefore quoted utterances of this court in *Toledo, St. L. & W. R. Co. v. Allen*,

*supra; Chicago, M. & St. P. Ry. Co. v. Coogan, supra; Seaboard A. L. R. Co. v. Horton, supra; Second Employers Liability Cases, supra.*

In effect, though not in terms, the Kentucky court lays down the doctrine that in cases of injuries for which no right of recovery exists under the act of Congress, such act may be supplemented by state legislation. But such doctrine was definitely condemned by this Court in *New York Cent. R. Co. v. Winfield, supra.* and *Erie Railroad Company v. Winfield, supra.* Whatever uncertainty may theretofore have existed as to the exclusive nature of the Federal act was removed by the decisions in those cases. It was there sought to sustain the right of interstate employes to compensation under state compensation acts in those cases where, because of absence of negligence, there was no right of recovery under the Federal act. In denying the application of the state statutes this court in the first *Winfield* case said:

> "Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line. Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. Ed. 772, 777, 778, 13 Sup. Ct. Rep. 914. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress * *
>
> "True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is

because Congress, in its discretion, acted upon the principle that compensation should be extracted from the carrier, where and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the states free to require compensation where the act withholds it. • • •

"That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. • • •

"Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several states require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no state is at liberty thus to interfere with the operation of a law of Congress. • • •

"Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a resulation of the carrier's duty or obligation as to both. And the reasons which operate to prevent the states from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it."

And in the second *Winfield* case there was added this pertinent comment:

"It establishes a rule or regulation which is intended to operate uniformly in all the

states, as respects interstate commerce, and in that field it is both paramount and exclusive."

The manifest intention of Congress to establish a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees has been commented upon in other decisions of this court. Thus in *Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417*, it is said:

> "We may not piece out this act of Congress by resorting to the local statutes of the state of procedure or that of the injury."

And in *Seaboard A. L. R. Co. v. Horton, supra*, it was said that it was not conceivable that Congress "intended to permit the legislatures of the several states to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees."

See also *Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 47 S. Ct. 207, 71 L. Ed. 432.*

If a state may not confer upon an employee within the scope of the act the right to obtain compensation for an injury for which, because of the absence of negligence, there is no right of recovery under the Federal statute, it would seem to necessarily follow that a state may not confer upon such employee a right of recovery under the Federal statute itself for an act which the state, and not Congress, has declared unlawful. To hold otherwise would be to destroy the uniformity which Congress endeavored to obtain by the passage of

the act. It requires no great degree of imagination to picture the utter destruction of all uniformity in the scope and effect of the Federal statute if that act is to be made the vehicle for recoveries based upon the different legislation of the respective states regulating the age of employment, hours of labor, working conditions and other matters affecting the health and comfort of employees.

Neither can the decision of the Kentucky Court of Appeals be sustained upon the theory that the Kentucky statute as a state police regulation may supplement the provisions of the Federal act. The *Winfield* cases answer any such contention, for it was expressly held in *New York Cent. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247*, that the same law that was before the court in the first *Winfield* case *(244 U. S. 147, 37 S. Ct. 546, 61 L. Ed. 1045)*, could be upheld against an attack upon the ground that it impaired the constitutional guarantee of freedom of contract only upon the theory that it was "a reasonable exercise of the police power of the state." If more need be added, it may be found in the language of Mr. Justice Story in *Prigg v. Pennsylvania, 16 Pet. 539, 617, 10 L. Ed. 1060, 1090:*

> "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it can not be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it

does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it. * * * The will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

See also *Southern R. Co. v. Reid, 222 U. S. 424, 32 S. Ct. 140, 56 L. Ed. 257; Chicago R. I. & Pac. R. Co. v. Hardwick Farmers El. Co., 226 U. S. 426, 33 S. Ct. 174, 57 L. Ed. 284; Erie R. Co. v. New York, 233 U. S. 671, 34 S. Ct. 756, 58 L. Ed. 1149; Penn R. Co. v. Pennsylvania, 250 U. S. 566, 40 S. Ct. 36, 63 L. Ed. 1142; Napier v. Atlantic Coast Line R. Co., supra.*

## V

## THE MICHIGAN, CALIFORNIA AND ARKANSAS CASES

The precise question here involved was before the Supreme Court of *California in Smithson v. Atchison T. & S. F. Ry., 174 Cal. 148, 162 Pac. 111;* the Supreme Court of Michigan in *Petranek v. Minneapolis, St. P. & S. S. M. Ry. Co., 240 Mich. 655, 216 N. W. 467;* and the Supreme Court of Arkansas in *St. Louis-San Francisco Ry. Co. v. Conly, 154 Ark. 29, 241 S. W. 365.*

In the *Smithson* case, the action was under the Federal act, and the plaintiff sought to avoid the defense of contributory negligence upon the ground that his employment was in violation of the Child Labor Law of California. It was held that the state statute was without application to an action under the Federal act.

In the *Petranek* case, the suit was brought under the state law and a recovery sought for an alleged violation of a Michigan statute forbidding the employment of persons under 18 years in any hazardous occupation. The issue presented and the conclusion of the court was as follows:

> "Defendant offered evidence to show that at the time of the accident both plaintiff and defendant were engaged in interstate commerce. The evidence was rejected. This was error. If the accident arose while the parties were engaged in interstate commerce, plaintiff's cause of action, if any, was under the Federal Employers' Liability Act (45 USCA Secs. 51-59 U. S. Comp. St. Secs. 8657-8665), and plaintiff might not then rely upon a violation of a statute of the state as evidence or proof of negligence."

The *Condy* case was brought under the Federal act, and the instructions given by the trial court authorized a recovery if the employment of the plaintiff was unlawful under the state law. In holding such instruction erroneous the court said:

> "It is unnecessary to say more. Congress through the Federal Employers' Liability Act, has covered the entire field of liability of interstate carriers to their employees for injuries sustained by them while engaged in such commerce. It is unquestionably within the power of Congress under the commerce clause of the Constitution to prohibit carriers engaged in interstate commerce from employing minors under a certain age, and to make such carriers liable for any injuries sustained by such employees while engaged

in interstate commerce. Congress having such power and having entered on such field of legislation, state Legislatures covering the same subject-matter are as much bound by the silence of Congress as by what it has expressly declared within the scope of its power. As is pugently expressed by the Supreme Court of the United States in one of its cases, 'We may not piece out this act of Congress by resorting to the local statutes.' It is therefore wholly beyond the power of the state Legislature to make carriers engaged in interstate commerce civilly liable in damages for injuries to their employees while engaged in such commerce for the violation of some police regulation of the state. This power of Congress, under the commerce clause of the Constitution, does not in any manner trench upon or dislodge the police power of the states over their own local and internal affairs which are reserved to them under the Tenth Amendment to the Constitution. * * * * *

"But such power is altogether different, and occupies an entirely different field from the power to create a civil liability in favor of the employees of carriers while engaged in interstate commerce against their employers for the violation of some police regulation of the state. The former power the state possesses exclusively; the latter is possessed by Congress alone after it has once assumed jurisdiction over the subject."

## VI

It is evident that the decision of the Court of Appeals of Kentucky, and the argument of the respondent herein, are based upon what is conceived to

be the holding of this court in *Frese v. Chicago B. & Q. Ry. Co., 263 U. S. 1, 44 S. Ct. 1, 68 L. Ed. 131.* If in that case it was meant to say that the rights and obligations of either the employer or the employee under the Federal act may be limited or enlarged by any state statute, then we frankly concede that such holding is in conflict with other decisions of this court, both prior and subsequent thereto. In *Spokane & Inland E. R. Co. v. Campbell, supra,* it is expressly held that an employee's right of action under the Federal Statute is not affected by his violation of a state statute. It is not to be presumed that the court intended in the *Frese* case, in the absence of any reference thereto, to overrule this decision as well as in effect to overrule the *Horton Winfield* and other cases hereinbefore cited. It seems to us that the *Frese* case should be read in connection with the prior decision in *Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732,* and the subsequent decision in *Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212.* Read together, these three cases lay down the unquestionably sound principle that it is contrary to public policy to permit an employee to recover for an injury which directly results from his failure to perform a primary duty owed by him not only to his employer, but to the traveling public as well. The duty which Frese failed to perform, while enjoined by the state statute, as the duty which Wiles failed to perform was enjoined by the rules of the railway company, would have been owed independent of the statute, just as the same duty was held to have been owed in the *Kennedy* case. In short, in all three cases it was the breach in the performance of a duty owed by the injured employee which defeated recovery—a

duty that in one case happened to be defined by general principles of law, in another, by the rules of the employer, in the other, by a state statute. The nature or character or source of the definition is of incidental importance, for the definition did not create—it merely defined the duty.

Respectfully submitted,

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